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SEP 21 2009

Federal Communications Commission
 Office of the Secretary

VIA HAND DELIVERY

September 21, 2009

Marlene H. Dortch, Secretary
 Office of the Secretary
 Federal Communications Commission
 445 12th Street, SW
 Suite TW-A325
 Washington, DC 20554

Re: *Petition of Qwest Corporation for Forbearance Pursuant to
 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan
 Statistical Area, WC Docket No. 09-135*

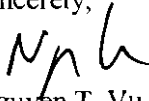
Dear Secretary Dortch:

Enclosed for filing in the above-referenced proceeding are two copies of the REDACTED version of the Opposition of Paetec Holding Corp. This Opposition is also being submitted in the Commission's Electronic Comment Filing System (ECFS).

Under separate cover and in accordance with the First Protective Order in this proceeding,¹ Confidential copies of this Opposition are being submitted to you via hand delivery and with Tim Stelzig and Denise Coca of the Wireline Competition Bureau via email.

Also enclosed is an extra copy of this redacted filing, please date stamp and return it to the courier. Should you have any questions about this filing, please contact me.

Sincerely,


 Nguyen T. Vu

Enclosure

cc (via email): Competition Policy Division (CPDcopies@fcc.gov)
 Best Copy and Printing (fcc@bcpiweb.com)

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¹ Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, WC Docket No. 09-135-97, First Protective Order, DA 09-1667 (rel. July 29, 2009).

Before the
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Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Petition of Qwest Corporation for Forbearance)
Pursuant to 47 U.S.C. § 160(c) in the Phoenix,)
Arizona Metropolitan Statistical Area)

WC Docket No. 09-135

OPPOSITION OF
PAETEC HOLDING CORP.

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September 21, 2009

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	11
I. INTRODUCTION AND SUMMARY.....	1
II. THE FCC MUST ADOPT A NEW FORBEARANCE STANDARD.....	5
III. THE PETITION FAILS TO MEET THE STATUTORY FORBEARANCE STANDARD	6
A. Loop and Transport Unbundling Remains Necessary to Assure that Qwest's Rates Are Reasonable and Non-Discriminatory	6
1. Qwest's Petition Fails to Satisfy the Market Power Standard as Qwest Still Wields Considerable Power in all Telecommunications Markets in Phoenix	7
a. Qwest Remains the Dominant Provider in Phoenix for Residential Consumers.....	7
(1) Qwest has Failed to Provide Significant Reliable Evidence of Competition in the Telecommunications Market by Cable Operators.....	7
(2) Wireless Service is Not a Viable Substitute for Qwest's Last Mile Facilities	8
(3) The FCC Should Not Deviate from the <i>Verizon Six-MSA Order</i> Establishing that Over-the-Top VoIP Should Not be Included in Forbearance Analysis Because it is Not a Close Substitute.....	11
b. Qwest Offers No Evidence that Wireline CLECs Provide Significant Competition in the Residential Market.....	13
(1) An Elasticity Analysis Shows that Qwest Still Yields Significant Market Power in the Phoenix Residential Market.....	15
c. Qwest has Not Shown Sufficient Competition to Justify Forbearance in the Business Market.....	16
(1) Qwest's Claim of Competition Improperly Relies on Competition Provided over Facilities Qwest Owns and Controls.....	18
(2) Qwest's Claims Regarding Competition from Facilities-Based CLECs are Unreliable	20
(a) The Existence of Some Fiber Networks in the MSA Does Not Alone Show Sufficient Competition to Warrant Forbearance.....	21
(b) Qwest Places Too Much Emphasis on Potential Competition.....	23

REDACTED

- For Public Inspection -

d. Qwest Fails to Demonstrate Sufficient Competition to Justify Forbearance in the Wholesale Market	25
B. Forbearance Would Harm Competition Because Loop and Transport Unbundling Remains Necessary to Protect Consumers.....	28
1. UNE-Based Competition is Significant in Phoenix.....	29
2. Forbearance Would Harm Consumers.....	30
3. Forbearance Would Create a New Barrier to Entry	31
a. CLECs are Impaired in Phoenix Without Unbundled Access to UNEs Because of Higher Costs and Lower Margins.....	31
C. Forbearance Would Not Serve the Public Interest.....	32
1. The Experience of Omaha Shows that Qwest Will Not Offer Reasonable Terms and Conditions for Wholesale Service	38
D. Forbearance Would be Unlawful	43
IV. CONCLUSION.....	46

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- For Public Inspection -

**Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)	
)	
Petition of Qwest Corporation for Forbearance)	WC Docket No. 09-135
Pursuant to 47 U.S.C. § 160(c) in the Phoenix,)	
Arizona Metropolitan Statistical Area)	

**OPPOSITION OF
PAETEC HOLDING CORP.**

PAETEC Holding Corp., on behalf of its operating subsidiaries, PAETEC Communications, Inc., US LEC, and McLeodUSA Telecommunications Services, Inc. (jointly referred to as “PAETEC”) submits these comments in response to the Public Notice¹ seeking comment on the Petition of Qwest Corporation (“Qwest”)² requesting forbearance from a broad range of its regulatory obligations under the Act.

I. INTRODUCTION AND SUMMARY

It is incumbent upon the Commission to take this opportunity to adequately explain and enhance the Commission’s forbearance standard, to recognize that its previous forbearance decisions were flawed and apply a new framework for analyzing petitions for

¹ *Pleading Cycle Established for Comments on Qwest Corporation’s petition for Forbearance in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Public Notice, DA 09-1653 (rel. July 29, 2009). Comment date extended by *Wireline Competition Bureau Extends Comment Due Dates on Qwest Corporation’s Petition for Forbearance in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, DA 09-1836 (rel. Aug. 20, 2009).

² Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix Arizona Metropolitan Statistical Area, WC Docket No. 09-135 (filed March 24, 2009) (“Qwest Petition”).

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- For Public Inspection -

forbearance from the Act's unbundling obligations. Upon applying this new analytical framework to Qwest's petition for Phoenix, the Commission should deny Qwest's bid to prematurely stifle competition in the Phoenix metropolitan statistical area ("MSA"). The Commission should not take the approach it did in the *Omaha Forbearance Order*³ by prematurely lifting Qwest's wholesale obligations. In Omaha, that flawed policy left consumers, as well as PAETEC and other competitors, captive to Qwest's significant market power.

Qwest remains the dominant telecommunication service provider and has a stranglehold over the ubiquitous bottleneck loop and transport facilities throughout the Phoenix MSA. Moreover, the competition relied on in Qwest's petition is neither significant enough nor ubiquitous enough to warrant forbearance. Facilities-based CLECs in Phoenix still only serve small pockets of the MSA with their own facilities, and other CLECs rely primarily on facilities (including UNEs, special access and UNE-P services offered under "commercial" agreements) in order to compete with Qwest. The wireline CLEC competitors cited in Qwest's petition primarily were able to enter into the Phoenix MSA because Qwest had to make UNEs available to them under Section 251(c)(3). Qwest offers no evidence that those competitors that do rely on their own facilities rather than Qwest's network can serve residential end user locations throughout the Phoenix MSA. A close look at the data Qwest submits regarding the level of wireline CLEC competition reveals that a significant number of Qwest's competitors in the Phoenix MSA are actually

³ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*"), *aff'd*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

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UNE-based. Consumers would be harmed by eliminating unbundling requirements because competitors that rely on Qwest's UNEs in the Phoenix MSA would be forced to pay excessive special access rates instead of TELRIC-based rates and, as a result, the prices for competitive services would increase and the competitive service provider would no longer be able to provide service.

Qwest continues to point to mobile wireless service as a "competitor," although the Commission has established this is not a substitute for the package of services demanded by consumers in the residential market and falls well short of the robust services business customers demand from wireline providers. And the cable competition provided by Cox alone is not enough to warrant forbearance since, at best, residential customers in Phoenix would be left with a duopoly between Cox and Qwest. As the experience in Omaha post-forbearance has demonstrated, that is a recipe for deterioration in the competitiveness of the telecommunications market.

Similarly, Qwest has not shown robust and ubiquitous facilities-based competition in the business market to justify forbearance. To the extent Qwest's competitors are competing extensively using Qwest's special access services, the Commission has repeatedly recognized that the availability of UNEs is a competitive constraint on special access pricing and that many competitive carriers rely on special access because of anti-competitive obstacles the RBOCs — including Qwest — create to efficient access to UNEs. Additionally, Qwest's maps and statements of total fiber miles and buildings served provide absolutely no useful information in terms of identifying actual locations of competitive fiber that could provide service, or whether the owners of the competitive fiber offer a viable wholesale alternative.

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Qwest must be required to show more than that the conditions for *potential* competition exist in a particular market segment. Qwest must demonstrate with specificity the existence of *actual* competition — that is, multiple competitors winning market share and providing services over their own networks. While Qwest attempts to show that some carriers are making wholesale services available to other carriers in portions of the Phoenix MSA, the data Qwest proffers is aggregated at too high a level to be informative of market conditions throughout the Phoenix MSA. The Commission’s “predictive judgment” in the *Omaha Forbearance Order* that Qwest would make reasonable wholesale offerings in that MSA has proven erroneous and cannot rationally provide any guidance in this proceeding. In reality, the Omaha forbearance decision directly caused PAETEC’s exit from that market, and deterred other carriers from entering. Indeed, if anything, the lesson learned from the Omaha experiment is to not make the same mistake again.

Qwest’s forbearance request fails to meet the Section 10(a)(3) public interest standard under the Commission’s standards set forth in the *Omaha* and *Anchorage Forbearance Orders*. Because adequate competitive facilities-based alternatives to Qwest’s bottleneck facilities have not developed in the Phoenix MSA, it would not be in the public interest to grant Qwest’s forbearance petition as to Section 251(c)(3) unbundling. Since the Commission lifted Qwest’s unbundling obligations in the Omaha MSA, Qwest has proposed uneconomical, onerous, and non-negotiable offerings to replace the Section 251(c)(3) network elements for the affected wire centers.

Lastly, the Commission must revisit its ruling in the *Omaha Forbearance Order* and establish a definition of “fully implemented” that is consistent with its view ex-

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pressed in the *Local Competition Order*, or provide a complete justification for reversing course.

II. THE FCC MUST ADOPT A NEW FORBEARANCE STANDARD

On June 19, 2009, the U.S. Court of Appeals for the D.C. Circuit held that the FCC had erroneously denied Verizon's petitions for forbearance from UNE regulations in the Commission's *Verizon Six-MSA Order*.⁴ It is incumbent upon the Commission to take this opportunity to adequately explain and enhance the Commission's forbearance standard. The Commission should take this opportunity to recognize that its previous forbearance decisions were flawed and adopt a new framework for analyzing petitions for forbearance from the Act's unbundling obligations. This revised framework should respond to the issues raised by the Court's remand, remedy the serious deficiencies in the *Omaha Forbearance Order*⁵ and faithfully adhere to the statutory test set forth in Section 10 to be consistent with the Act's impairment framework, sound competition policy and economics, and the statutory forbearance criteria.⁶

⁴ *Verizon Tel. Cos. v. FCC*, No. 08-1012 (D.C. Cir. June 19, 2009).

⁵ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*"), *aff'd*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

⁶ It is well-established that the Commission is "entitled to reconsider and revise its views as to the public interest and the means to protect that interest," so long as it gives a reasoned explanation for the revision. *See, e.g., DirecTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997).

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In separate comments on the Court's remand, PAETEC has laid out a new analytical framework for the Commission to employ in its UNE forbearance analysis.⁷ Our analysis of the deficiencies in Qwest's petition will reference the analytical framework we urge the Commission to adopt.

III. THE PETITION FAILS TO MEET THE STATUTORY FORBEARANCE STANDARD

A. Loop and Transport Unbundling Remains Necessary to Assure that Qwest's Rates Are Reasonable and Non-Discriminatory

The *Omaha Forbearance Order* utterly ignored the *Triennial Review Remand Order* ("TRRO")⁸ by relying on the availability of Qwest special access services to justify the elimination of access to unbundled loops and transport. Having ruled in the *TRRO* that it would be a "hideous irony" to rely on special access—"the pricing of which falls largely within [ILEC] control"⁹—the *Omaha Forbearance Order* irrationally relied *primarily* on the availability of special access in determining that continued application of Section 251(c)(3) was no longer necessary to ensure just, reasonable and non-discriminatory rates or to protect consumers in the Omaha MSA.

The Commission should not take a similar approach when addressing Qwest's current petition. Without the essential cost-based UNE pricing safeguard, there is nothing to prevent Qwest from raising prices on wholesale services to something "close to or

⁷ Comments of PAETEC Holdings Corp., WC Docket Nos. 06-172 & 07-97 (filed Sept. 21, 2009) A copy of these comments is appended as Attachment 1 and incorporated herein by reference.

⁸ *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order On Remand, 20 FCC Rcd 2533, 2638 ¶ 193 n.508 (2005), *aff'd sub nom. Covad Comm'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) ("TRRO")

⁹ *TRRO*, 20 FCC Rcd at 2567 ¶ 59.

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equal to” the retail rate, creating price squeezes. The Commission itself envisioned this scenario chilling competition. Thus, rather than sustaining a local competitive market, the elimination of Qwest’s obligation to provide UNEs will ultimately destroy it by trusting Qwest to maintain competitive wholesale pricing even though the company has little incentive to do so.

1. Qwest’s Petition Fails to Satisfy the Market Power Standard as Qwest Still Wields Considerable Power in all Telecommunications Markets in Phoenix

a. Qwest Remains the Dominant Provider in Phoenix for Residential Consumers

Qwest’s Petition must be denied because its showing of competition is internally inconsistent, unexplained, incomplete, and fails to meet any rational interpretation of the statutory forbearance standard in numerous respects.

(1) Qwest has Failed to Provide Significant Reliable Evidence of Competition in the Telecommunications Market by Cable Operators

In its prior forbearance orders, the Commission reasoned that it would be appropriate to forbear from application of Section 251 unbundling obligations “only in wire centers where a competitor has facilities coverage of at least 75% of the end user locations accessible from a wire center”¹⁰ with “coverage” defined as existing where a

¹⁰ See *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958, 1977, ¶ 31 (2007) (“*Anchorage Forbearance Order*”), appeals dismissed, *Covad Communications Group, Inc. v. FCC*, Nos. 07-70898, 07-71076, 07-71222 (9th Cir. 2007) (dismissing appeals for lack of standing); see also *Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd 21293, 21313 ¶ 37 (2007) (“*Verizon Six-MSA Forbearance Order*”).

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competitor “uses its own network, including its own loop facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC’s local service offerings.”¹¹ Qwest has not made any showing at all of cable coverage.

Qwest’s petition does not include any concrete factual information about the location or extent of actual facilities-based cable competitive presence. Instead, it relies on vague assertions of the existence of cable competition that are at best circumstantial. The only evidence of cable coverage that Qwest provides is a reference to Cox’s website purporting to show that Cox offers telephony services throughout its service territory in the Phoenix MSA.¹² This type of information is too vague to permit any findings of actual cable competition in any location in Phoenix.

(2) Wireless Service is Not a Viable Substitute for Qwest’s Last Mile Facilities

According to Qwest, it is experiencing a significant intermodal threat from wireless service because “[c]ompetition from wireless providers is flourishing in the Phoenix MSA and in Arizona as a whole.”¹³ Qwest further states that the number of wireless lines exceeds the total number of CLEC and Qwest lines, and that a substantial number of customers are “cutting the cord” to rely exclusively on wireless service.¹⁴ Qwest thus

¹¹ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19444, n.156 (2005) (“*Omaha Forbearance Order*”), *aff’d*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

¹² Qwest Petition at 14.

¹³ *Id.* at 16.

¹⁴ *Id.* at 16-17.

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contends that wireless service competition alone is sufficient to ensure that market forces will protect the interests of consumers even if the Commission forbears from unbundling obligations.¹⁵

Qwest mustered similar arguments in its Omaha Petition¹⁶ and offered statistics purporting to show that wireless service is available throughout the Omaha MSA, wireless use was extensive, and that an increasing number of wireless users were substituting wireless service for wireline.¹⁷ Despite the *Omaha Forbearance Order's* unequivocal rejection of Qwest's assertions,¹⁸ Qwest surprisingly repeats them in its latest Petition. Qwest also uses general nationwide observations from industry analysts showing increases in wireless market share to support its arguments.¹⁹

General wireless penetration data of the type that Qwest has provided does not support forbearance. In the *Omaha Forbearance Order*, the Commission found that:

Qwest has not submitted sufficient data concerning the full substitutability of interconnected VoIP and wireless services in its service territory in the Omaha MSA, and *because the data submitted do not allow us to further refine our wire center analysis, we do not rely here on intermodal competition from wireless* and interconnected VoIP services to rationalize forbearance from unbundling obligations.²⁰

¹⁵ Qwest Petition at 16-22.

¹⁶ Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. Sec. 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223, at 9 (filed June 21, 2004) ("Qwest Omaha Petition").

¹⁷ Qwest Omaha Petition at 9-12.

¹⁸ *Omaha Forbearance Order*, 20 FCC Rcd at 19452 ¶ 72.

¹⁹ Qwest Petition at 17-18.

²⁰ *Omaha Forbearance Order*, 20 FCC Rcd at 19452 ¶ 72.

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The Commission made a similar finding in the *Anchorage Forbearance Order*, noting the lack of sufficient data to evaluate the extent of substitution of wireless services in the Anchorage study area,²¹ and it should not deviate from that precedent here.

Further, wireless service should not be counted as an intermodal competitor because major wireless carriers remain heavily dependent on ILEC special access and transport services and because wireless service is not a viable substitute for wireline last mile facilities. In the *TRRO*, the Commission recognized that “CMRS connections in general do not yet equal traditional landline local loops in their quality, their ability to handle data traffic, and their ubiquity.”²² This applies equally in both the residential and business markets. It also applies to fixed wireless, which the Commission found did “not ... offer significant competition in the business loop market.”²³ Nothing has changed since the *TRRO* that would allow the Commission to deviate from this decision.

In addition, at the present time, wireless service does not provide comparable, or in some cases any, broadband access to the Internet. At most, therefore, wireless contin-

²¹ *Anchorage Forbearance Order*, 22 FCC Rcd at 1976 ¶ 29.

²² *Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17119-20 ¶ 230 (2003) (“*TRO*”), aff’d in part, remanded in part, vacated in part, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir 2004) (“*USTA II*”), cert. denied sub nom. *Nat’l Ass’n Regulatory Util. Comm’rs v. United States Telecom Ass’n*, 125 S Ct 313, 316, 345 (2004).

²³ *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order On Remand, 20 FCC Rcd 2533, 2637-8 ¶¶ 193 n.508 (2005), aff’d sub nom. *Covad Comm’ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) (“*TRRO*”) (emphasis added).

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ues to be a complement to wireline service, not a substitute for it.²⁴ If wireless is not a complete substitute for landline service, there is no basis for the Commission to find that the availability of wireless service is sufficient to protect consumers in the absence of unbundling obligations.

**(3) The FCC Should Not Deviate from the *Verizon Six-MSA Order*
Establishing that Over-the-Top VoIP Should Not be Included
in Forbearance Analysis Because it is Not a Close Substitute**

In the *Verizon Six-MSA Order*, the Commission did not include providers of “over-the-top” or nomadic VoIP services in its competitive analysis “because there are no data in the record that justify finding that these providers offer close substitute services.”²⁵

Qwest’s assertions regarding competition from VoIP providers in the Phoenix MSA simply repeat claims the Commission expressly repudiated in both the *Omaha* and *Anchorage Forbearance Orders*. In the *Omaha Forbearance Order*, the Commission found, among other things, that because Qwest had not submitted sufficient data showing how VoIP and wireless services are substitutes to § 251(c)(3) loop and transport facilities, it did not rely on “intermodal competition from wireless and interconnected VoIP services to rationalize forbearance from unbundling obligations.”²⁶ In addition, the Commission has repeatedly and correctly held that intermodal competition from wireless and

²⁴ See, e.g., UBS Investment Research, Comcast Corporation Site Visit, 20 November 2006, at 2 (“Comcast views a wireless offering as an add-on strategy to further extend its triple play bundle [which includes voice provided over wireline/cable facilities] and to reduce chum, rather than the next leg in the company’s growth.”).

²⁵ *Verizon Six-MSA Order*, 22 FCC Rcd at 21305 ¶ 23.

²⁶ *Omaha Forbearance Order*, 20 FCC Rcd at 19452 ¶ 72; see also *Anchorage Forbearance Order*, 22 FCC Rcd at 1976 ¶ 29 (concluding that “we do not include competition from wireless and interconnected VoIP services in [the] market analysis”).

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VoIP providers is not a significant source of competitive restraint on traditional ILEC wireline services nor could it be deemed an equivalent substitute to an ILEC's wireline service.²⁷

Over-the-top-VoIP providers are not equivalent substitutes to an ILEC's wireline service. In the *TRRO*, the Commission readily dismissed RBOC arguments that the existence of intermodal competition from VoIP providers justified limiting access to UNEs for the provision of local exchange service.²⁸ It found that broadband service, which is the essential underpinning to VoIP service, was not ubiquitous enough for VoIP to threaten wireline service.²⁹ It properly concluded that within the existing broadband market, DSL customers view VoIP service as a supplement to, rather than a replacement for, wireline service because VoIP requires an existing wireline connection.³⁰ It therefore held that VoIP should not be viewed as "a substitute for wireline telephony."³¹

Moreover, in many instances, the broadband connections on which the VoIP service rides is provided using a UNE loop. The Commission has held that forbearance from application of Section 251(c)(3) on the basis of competition that exists only due to Section 251(c)(3) would undercut the very competition being used to justify the forbearance.³² The Commission cannot "engage in that type of circular justification."³³ Stated

²⁷ See, e.g., *TRRO*, 20 FCC Rcd at 2556-7 ¶ 39 n.118 & 2637-8 ¶ 193 n.508; *TRO*, 18 FCC Rcd at 17119-20 ¶ 230.

²⁸ *TRRO*, 20 FCC Rcd at 2556-7 ¶ 39 n.118.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Omaha Forbearance Order*, 20 FCC Rcd at 19450 ¶ 68 n.185.

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differently, granting forbearance from Section 251(c)(3) unbundled loop obligations may restrict some carriers from continuing to participate in the broadband market in the Phoenix MSA, which would adversely affect the availability of VoIP services as well.³⁴ Hence, Qwest's claim that loop and transport unbundling forbearance is appropriate due to the "viable alternative to Qwest's traditional residential service"³⁵ is clearly wrong.

At bottom, the extent of competitive alternatives for voice services from cable, VoIP, and wireless to Qwest's retail wireline voice services are by no means a barometer of the extent of competitive alternatives to Qwest's bottleneck loop and transport facilities. At most, Qwest's factual allegations, if true, would only demonstrate that forbearance relief is justified for Section 251(c)(3) voice grade switching.³⁶ Qwest has not shown that facilities-based competition exists for the full capabilities of its wireline Section 251(c)(3) loop and transport UNEs and that forbearance from this obligation is justified.

**b. Qwest Offers No Evidence that Wireline CLECs Provide
Significant Competition in the Residential Market**

Qwest implicitly claims that it faces so much competition in the Phoenix MSA that it is essentially a non-dominant provider of loop and transport capacity. However, as demonstrated above, Qwest actually remains the dominant telecommunication service

³³ *Id.*

³⁴ See also Letter from John F. Dudley, Counsel, Commonwealth of Virginia State Corporation Commission, to Marlene H. Dortch, Secretary, FCC, WC Docket 06-172, Attachment at 8 (filed Dec. 15, 2006).

³⁵ Qwest Petition at 24.

³⁶ The Commission has already granted such unbundling relief. See *TRRO*, 20 FCC Rcd at 2641-2 ¶ 199; *TRO*, 18 FCC Rcd at 17237 ¶ 419.

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provider and has a stranglehold over these ubiquitous bottleneck loop and transport facilities throughout the MSA. The wireline CLEC competitors cited by Qwest do not alter this fact.³⁷ They primarily exist and were able to enter into the Phoenix MSA because Qwest had to make UNEs available to them on a under section 251(c)(3). As discussed in Section B.1, below, Qwest offers no evidence that those competitors that do rely on their own facilities rather than Qwest's network can serve residential end user locations throughout the Phoenix MSA. Indeed, of the *****Begin Confidential End Confidential***** wireline CLECs cited by Qwest, *****Begin Confidential End Confidential***** are either using Qwest's Local Services Platform ("QLSP") or reselling Qwest's services.³⁸

While Qwest claims it meets the same competitive standard set forth in the *Omaha Forbearance Order*, it overlooks the fact that "competition based on UNE loops and transport ma[d]e up a minor portion of the competition in the Omaha MSA," so that the Commission did not have to consider UNE-based competition in its analysis.³⁹ The same cannot be said about the Phoenix MSA.

³⁷ Qwest Petition at 22-23.

³⁸ Qwest Petition at 23.

³⁹ *Omaha Forbearance Order*, 20 FCC Rcd at 19449-50 ¶ 68. In the *Anchorage Forbearance Order*, the Commission did not consider UNE-based competition because, *inter alia*, there was "limited retail market demand for high-capacity [DS-1 and above] telecommunications services in the Anchorage study area" and because GCI was actively migrating its existing customers to its "own last mile facilities." *Anchorage Forbearance Order*, 22 FCC Rcd at 1980-82 ¶ 36 (emphasis added) & n.84. Unlike Anchorage, there is unequivocal evidence of extensive demand for high capacity special access DS-1 and DS-3 services in the Phoenix MSA. *See, e.g.*, Qwest Petition at 28-30. Also, unlike Anchorage, there is no evidence that competitors are actively migrating all facilities purchased from Qwest to their own facilities.

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Even assuming Qwest could properly seek forbearance from loop and transport unbundling throughout the Phoenix MSA, it would still need to demonstrate the *actual* geographic extent of competitive wireline facilities in the Phoenix MSA and the availability of residential services over such facilities for the Commission to make a finding as to whether the Section 10(a)(1) standard was actually satisfied throughout the Phoenix MSA.⁴⁰ Qwest has failed to do even that. It relies solely on generalized claims that the mere presence of wireline competitors in the residential and business market in the Phoenix MSA supports unbundling forbearance.

**(1) An Elasticity Analysis Shows that Qwest Still Yields
Significant Market Power in the Phoenix Residential Market.**

The Commission has repeatedly found that residential customers are highly demand-elastic and willing to switch to or from their provider to obtain price reductions and desired features.⁴¹ Qwest has not submitted any data or estimates regarding the price elasticity of demand or the elasticity of supply for its residential services. While, in passing, Qwest refers to the *Omaha Forbearance Order's* discussion on supply elasticity,⁴² Qwest does not provide any evidence that would enable the Commission to find that residential services in the Phoenix MSA have high supply elasticity.

While some competitive facilities have been deployed in the Phoenix MSA for the provision of residential telephone service by cable operators, the Commission cannot find that the evidence matches the evidence of competition relied upon in previous orders

⁴⁰ *Omaha Forbearance Order*, 20 FCC Rcd at 19446, 19448 ¶¶ 62, 66.

⁴¹ *Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3305, ¶ 63 (1995) (“*AT&T Reclassification Order*”).

⁴² Qwest Petition at 16.

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- For Public Inspection -

granting forbearance. In the absence of comparable evidence of facilities-based competition, Qwest's suggestion that its market share in the Phoenix MSA is sufficient to justify forbearance from dominant carrier regulation here is not persuasive. Indeed, where the Commission has found an incumbent carrier to be non-dominant in the provision of access services, it had a retail market share of less than *****Begin Confidential End Confidential***** and faced significant facilities-based competition.⁴³ It is significant that, in granting forbearance from dominant carrier regulation of residential switched access services in the *Omaha Forbearance Order* and *Anchorage Forbearance Order*, the Commission similarly emphasized the evidence of the competitive gains of facilities-based competitors, in conjunction with the incumbent LECs' overall market shares, in its marketplace analysis.

**c. Qwest has Not Shown Sufficient Competition to Justify
Forbearance in the Business Market**

In the Phoenix MSA, Qwest has not shown robust and ubiquitous facilities-based competition in the business market. Qwest asserts generally that Cox's cable network is

⁴³ *Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring It to be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2)*, Report and Order, 21 FCC Rcd 11506, 11519-21, ¶¶ 29-34 (declaring Qwest to be non-dominant in its provision of all interstate telecommunications services, including access services, in Terry, Montana, where a facilities-based competitor served between 85 and 93% of the access lines); cf. *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, Market Entry and Regulation of Foreign-Affiliated Entities, IB Docket No. 95-22, *Report and Order and Order on Reconsideration*, 12 FCC Rcd 23891, 23959, ¶ 161 (1997) (establishing a presumption that foreign carriers with less than 50% market share in each of the relevant foreign markets, including the market for local access, lack sufficient market power to adversely affect competition in the U.S., and noting that "[a]s the authors of the 1997 edition of the American Bar Association Antitrust Law Developments publication recently concluded, '[c]ourts virtually never find monopoly power when market share is less than about 50 percent.'" (Quoting A.B.A. Section of Antitrust Law, Antitrust Law Developments at 235-36 (4th ed.) (1997))).

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- For Public Inspection -

capable of reaching many business customers,⁴⁴ but ignores that “[e]ven where cable television [copper coaxial] networks reach [] business customers,” the networks “typically lack the capacity to serve large numbers of business customers that require telecommunications and Internet services at DS-1 and higher speeds.”⁴⁵ The record in the Commission’s special access proceeding demonstrates cable operators, such as Cox, cannot offer sufficient service level guarantees to support competitive business services and have severe security and reliability concerns.⁴⁶

Although Qwest asserts that Cox has “thousands” of fiber miles in the Phoenix MSA,⁴⁷ it fails to show precisely where Cox’s purported fiber cable network is in relation to the business customers, if it is lit and operational, or how many customers or what percentage of customers in what wire centers actually have access to these fiber facilities. Qwest’s references to a small number of Cox business customers fails to show that Cox is able to offer facilities-based competition to more than a handful of customer locations. Indeed, Qwest even admits that it does not have the ability to obtain a precise measurement of the market share of facilities-based business competitors in Phoenix.⁴⁸

⁴⁴ Qwest Petition at 27-28.

⁴⁵ Comments of XO *et al.*, WC Docket No. 05-25, at Declaration of Ajay Govil, XO ¶ 24 (filed Aug. 8, 2007) (“Govil Declaration”).

⁴⁶ Govil Declaration at ¶ 22-24; Ad Hoc Comments, WC Docket No. 05-25, at 7 (filed Aug. 8, 2007).

⁴⁷ Declaration of Robert H. Brigham Regarding the Status of Telecommunications Competition in the Phoenix, Arizona Metropolitan Statistical Area, WC Docket No. 09-135, at 23 (“Brigham Declaration”) filed as an attachment to Qwest Petition.

⁴⁸ Qwest Petition at 26-27.

**(1) Qwest's Claim of Competition Improperly Relies on
Competition Provided over Facilities Qwest Owns and
Controls**

In addition to Cox, Qwest asserts there are a “wide-range” of competitors competing with Qwest in the business market in Phoenix.⁴⁹ This “wide-range” of competitors, however, encompasses CLECs that “use[] unbundled network elements (UNEs), particularly unbundled loops, ... as [a] primary vehicle for serving and acquiring customers.”⁵⁰ As the Commission stated in the *Omaha Forbearance Order*, forbearance from application of section 251(c)(3) on the basis of competition that exists only due to section 251(c)(3) would undercut the very competition being used to justify the forbearance.⁵¹ The Commission should again “decline to engage in that type of circular justification.”⁵²

Qwest contends that UNE forbearance is warranted because competitors in Cox's service territory in the Phoenix MSA are competing extensively using Qwest's special access services.⁵³ This reasoning is also circular. The Commission has “repeatedly recognized that the availability of UNEs is a competitive constraint on special access pricing.”⁵⁴ The Commission has also observed that many competitive carriers rely on special access because of anti-competitive obstacles the RBOCs — including Qwest — create to efficient access to UNEs. The Commission previously has held that “competition that relies on [the RBOC's] own facilities is not a sufficient basis to grant forbear-

⁴⁹ Qwest Petition at 25.

⁵⁰ *Omaha Forbearance Order*, 20 FCC Rcd at 19417 ¶ 2 n.4.

⁵¹ *Id.*, at 19450 ¶ 68 n.185.

⁵² *Id.*

⁵³ Qwest Petition at 28-29.

⁵⁴ *Omaha Forbearance Order*, 20 FCC Rcd 19433-4 ¶ 38.

REDACTED
- For Public Inspection -

ance from UNE requirements.”⁵⁵ The Commission emphasized that it already had “eliminated UNE obligations for the exclusive provision of interexchange service or mobile wireless service based on the fact that competition for such services arose in the absence of UNEs.”⁵⁶ The competitive triggers established in the *TRRO* establish a basis for relief from unbundling obligations in the Phoenix MSA. The Commission accordingly found that it would not be “in the public interest to grant additional relief from UNE obligations based on that same competition.”

As the Commission is well aware, “special access” is not an “alternative” to ILEC loops and transport, but is simply an ILEC service — offered at higher prices — provided over these same network elements.⁵⁷ If the Commission deems special access as an alternative to itself and thereby immunized Qwest from cost-based pricing of elements on which competitors must rely, it would be putting the “cart before the horse” in a manner that would undermine the core purposes of the Act.

Thus the Commission should reject Qwest’s claim that competition from carriers relying on Qwest’s facilities provided under its special access tariffs have any role in the competitive analysis of a petition for forbearance from Qwest’s unbundling obligations. As the Commission has acknowledged, it would be a “hideous irony” to rely on special

⁵⁵ *Verizon Six MSA Forbearance Order*, ¶ 42.

⁵⁶ *Id.*, at ¶ 38.

⁵⁷ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587, 9603 (2000) (stating that the conversion of special access circuits to UNE status “should not require the special access circuit to be disconnected and re-connected because only the billing information or other administrative information associated with the circuit will change when a conversion is requested.”).

REDACTED
- For Public Inspection -

access—“the pricing of which falls largely within [ILEC] control” to justify the elimination of UNEs.⁵⁸

(2) Qwest’s Claims Regarding Competition from Facilities-Based CLECs are Unreliable

Qwest also asserts that a “significant amount” of competitors in Cox’s service territory in the Phoenix MSA are using their own or other alternative facilities to serve business customers.⁵⁹ It points to GeoTel data showing at least 25 unaffiliated providers that operate fiber networks within Cox’s service territory in the Phoenix MSA.⁶⁰ The Commission has consistently rejected outright the probity of this type of information in its forbearance analysis and held that “[w]e do not find persuasive any of the competitive fiber network data that [the RBOC] has filed in this docket, including ... the number of route miles on these networks; the number of wire centers in an MSA that a competing fiber provider can reach; or the materials from competitors’ web-sites describing their service offerings and territories.”⁶¹ The Commission emphasized that, “just as the *Triennial Review Remand Order* found the number of route miles, lists of fiber wholesalers, and counts of competitive networks to be unreliable and unsuitable as triggers for the impairment test, we also find that such data are not informative for identifying where any unbundling relief would be warranted.”⁶² The same conclusions should continue to

⁵⁸ *TRRO*, 20 FCC Rcd at 2567-8 ¶ 59.

⁵⁹ Qwest Petition at 30.

⁶⁰ *Id.* at 30.

⁶¹ *Verizon Six-MSA Forbearance Order*, 22 FCC Rcd 21316-7 ¶ 40.

⁶² *Id.*

REDACTED
- For Public Inspection -

apply. Accordingly, Qwest has not demonstrated the existence of sufficient competition in the business market to justify forbearance.

**(a) The Existence of Some Fiber Networks in the MSA Does
Not Alone Show Sufficient Competition to Warrant
Forbearance**

Qwest contends that there are extensive competitive fiber networks in the Phoenix MSA. According to Qwest, apart from cable, there are *****Begin Confidential End Confidential***** competitive providers that operate their own fiber networks in areas where business customers are concentrated in the Phoenix MSA, and competitors serve business customers in *****Begin Confidential End Confidential***** of Qwest's wire centers in the MSA.⁶³ It cites to number of Cox-provided fiber miles in the MSA, names fiber-based providers in the MSA, provides the number of building being served by competitive fiber in the MSA, and provides maps that purport to provide an overview of the location of competitive fiber and competitive fiber-lit buildings within the greater Phoenix area.⁶⁴

Qwest's maps and statements of total fiber miles and buildings served provide absolutely no useful information in terms of identifying actual locations of competitive fiber that could provide service. None of the data provided shows CLEC facilities in any detail within the respective MSAs. The "confidential" maps submitted by Qwest consist of nearly illegible drawings which it claims show the "coverage" of competitive fiber throughout the MSA. Because of the scale of the maps, the drawings appear simply as a tangle of lines making it impossible to identify any particular streets or buildings. It is

⁶³ Qwest Petition at 6.

⁶⁴ *Id.* at 30-31; Brigham Exhibits 8A & 8B.